IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.8920 OF 2005

Smt. Shanta Harilal Nahar .... Petitioner
Vs.
Sudarshan K. Mudliar .... Respondent

Shri S.D. Paigude for the Petitioner.

Shri V.S. Gokhale for the Respondent.

CORAM: R.M.S. KHANDEPARKAR, J.

DATED: OCTOBER 04, 2006

P.C:

1. Heard. The petitioner challenges the concurrent findings arrived at by the Courts below in relation to non-user of the premises for the purpose for which they were let out to the petitioner, acquisition of alternative suitable accommodation by the petitioner and thirdly, regarding the bona fide need of the premises to the landlord.

2. The impugned orders are sought to be challenged on two grounds: firstly, that the petitioner was not given sufficient opportunity to prove his case in as much as that his evidence was closed merely because on one of the days of recording of his evidence he remained absent and secondly, that the Court below did not appreciate the evidence in proper perspective in the sense that the

premises were held to be not in use for the purpose for which they were let out solely on the basis of the record relating to the meter reading of the electricity meter through which electricity is supplied to the premises.

3. As regards the first ground of challenge, it is seen that when the matter was fixed for cross-examination of the petitioner's attorney on 9-3-2004, the said attorney failed to appear before the Court. On account of his failure to appear in the Court, his evidence was closed and the affidavit was not considered as evidence on record. Subsequently, the proceedings were disposed of by the decree of eviction on 21-6-2004. Undisputedly, from 9-3-2004 no attempt was made at any point of time by the petitioner or her attorney to get the order of closure of the evidence set aside or to get the order for ex parte proceedings set aside and to participate in the proceedings to prove the pleas which were sought to be raised on behalf of the petitioner. It was only after disposal of the suit by the trial Court that in the appeal, for the first time, plea was sought to be raised about the sickness of the Advocate for the petitioner as well as the death of a close relative of the petitioner. Undisputedly, the son-in-law of the petitioner expired on 4-3-2004. No attempts were made by the petitioner to instruct the Advocate to seek

adjournment of the matter on 9-3-2004. It is not the case of the petitioner that the petitioner was unaware of the fact that her Advocate was suffering from throat cancer. In spite of the said knowledge, no attempt was made to appoint some other Advocate in the matter. In these circumstances, one cannot find any jurisdictional error in the order of the trial Court closing the evidence of the petitioner and directing the matter to be proceeded ex parte from 9-3-2004, so also no fault can be found in the order of the Appellate Court in not interfering in the said order in the facts and circumstances of the case.

4. As regards the second ground of challenge, it is true that the Courts below have heavily relied upon the reading of the electricity meter to arrive at the finding about non-user of the premises. The meter reading having been found static, both the Courts below have held that the same discloses non-user of the premises. It is, however, the contention on behalf of the petitioner that the meter reading records produced by the respondent himself disclose that for a considerable period of time the meter was found either faulty or was not recording the correct consumption of electricity. Even assuming so, fact remains that the respondent has been able to establish that the premises which is provided with the electricity meter to record

the consumption of electricity did not disclose consumption of electricity. In those circumstances, it was necessary for the petitioner to establish that in spite of the meter being faulty or not recording the consumption correctly, there was, in fact, supply of electricity which was enjoyed by the inmates of the premises in order to establish the user of the premises. Undisputedly, the petitioner has failed to establish the same. In other words, though the respondent discharged his burden in this regard and the onus having been shifted on the petitioner, the petitioner failed to discharge her onus in that regard. This being the case, on this aspect also, I do not find any jurisdictional error in the matter of assessment of the evidence nor it can be said that the Courts below have not assessed the evidence in proper perspective.

5. It is pertinent to note that the fact about acquisition of other property in the name of the son of the petitioner has not been disputed. On the contrary, there is clear admission to that effect. It is also admitted that the son of the petitioner has shifted to a newly acquired premises. It was the case of the petitioner that she is alone residing in the suit premises. In these circumstances, it was necessary for the petitioner to establish the same. It is more so in the facts and circumstances of the case where it is

revealed by the petitioner herself that on account of her ill-health she is not even able to appear before the Court and depose in the matter and that therefore she had appointed her son as her attorney. It is difficult to believe in such circumstances that the petitioner has been staying alone in the premises when her relation with the son are neither strained nor it is the case of the petitioner that she is not being looked after by her son. On the contrary, she has stated that she herself appointed her son as the attorney and he was required to depose before the Court in the matter. In the background of this case, the findings arrived at by the Courts below cannot be found fault with and the records nowhere disclose any jurisdictional error on the part of any of the Courts while deciding the matter. Hence, there being no case made out for interference in writ jurisdiction under Article 227 of the Constitution of India, the petition fails and is hereby dismissed.

6. At the oral request of the learned Advocate for the petitioner, time granted to the petitioner to vacate the premises till 28-2-2007, subject to the petitioner and all her major family members filing an undertaking in this Court to the effect that they will peacefully vacate the premises and handover the possession thereof to the respondent on or before 28-2-2007 and meanwhile will not induct any third party in the premises nor

create third party interest therein. The undertaking to be filed within a period of four weeks from today.

(R.M.S. Khandeparkar, J.)

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